United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 8, 2012

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comment on Proposed 2012 Amendments and Related Issues

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments on the Commission's proposed amendments and issues for comment during the amendment cycle ending May 1, 2012. Our comments begin with several fraud topics (Insider Trading, Calculation of Loss, Potential Sentence Enhancements, Mortgage Fraud, Harm to Public and Financial Markets, and the Overemphasis on Loss and Number of Victims); followed by various proposals related to prior convictions ("Sentence Imposed" Under the Illegal Re-Entry Guideline, the Categorical Approach to Classifying Certain Prior Offenses of Conviction, Burglary of a Non-Dwelling, and Driving While Intoxicated); Multiple Counts of Conviction; and Rehabilitation as a Mitigating Factor.

Proposed Amendments To § 2B1.4 (Insider Trading)

Following the February 2011 public comments by Preet Bharara, United States Attorney for the Southern District of New York, the Commission has proposed amending the Insider Trading Guideline, § 2B1.4, by adding a two-level enhancement if the "offense involved sophisticated insider trading" and a four-level enhancement if, at the time of the offense, the defendant held one of several specified positions in the financial industry.

The PAG believes there has not been a demonstrated need for these proposed changes, and suggests that the Commission carefully assess the available data for indications of that need before proceeding with possible amendments to § 2B1.4. In the vast majority of the recent insider trading prosecutions – including in particular the high profile prosecutions in the Southern District of New York – convicted

defendants have faced high Guidelines ranges and have received substantial sentences. Notably, because the sentences in these cases were imposed after Mr. Bharara's testimony last year, they underscore how the Guidelines are already sufficient to achieve the purposes of punishment and deterrence addressed in his testimony.[1] Raj Rajaratnam, who was subject to a Guidelines range of 235-293 months, received a sentence of 132 months on October 13, 2011. *See United States v. Rajaratnam*, 2012 WL 362031 (S.D.N.Y. Jan. 31, 2012).[2] Winifred Jiau, an expert affiliated with Primary Global Research, faced a Guidelines range of 78-97 months, even though her conduct netted her relatively little gain. Her sentence was 48 months. *See United States v. Jiau,* No. 11 Cr 161 (S.D.N.Y. 2011). Zvi Goffer received ten years on September 21, 2011, a sentence near the bottom of the 121-151 month Guidelines range. *United States v. Goffer*, No. 10 Cr 56 (S.D.N.Y. 2011). Craig Drimal, another defendant in the *Goffer* case, who was sentenced to 66 months on August 31, 2011, had a Guidelines range of 57-71 months, and Emmanuel Goffer, sentenced to 36 months, faced a Guidelines range of 41-51 months. *Id.* Looking beyond these results, we are unaware of any recent insider trading case in which a court expressed concern that it was unable to impose the appropriate sentence because the Guidelines range was too low.

The lengthy sentences called for by the existing version of § 2B1.4 make clear that courts already have the ability to impose significant prison terms on insider trading defendants, including cases where the criminal conduct involved defendants holding positions within the financial industry, was "sophisticated," or both. Given that many courts have sentenced insider trading defendants below the advisory range, the Commission should resist concluding that the insider trading Guidelines are too low. Just the opposite; the repeated imposition of below-guidelines sentences suggests that many courts, while fully empowered to impose lengthy terms of imprisonment, view the recommended Guidelines ranges as overly severe.

In our testimony last February, we pointed out how the Sentencing Commission itself has characterized the addition of an ever-increasing number of upward adjustments as "factor creep," and how the Commission observed that it

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1 Mr. Bharara stated at the February 16, 2011 public hearing: "There is concern, based on the experience of some Districts, that more and more, particularly in the context of high-loss, large scale fraud cases, there are not consistently tough and fair outcomes." Statement of Preet Bharara, at 3. Without question, the Southern District of New York has led the country in the prosecution, defense and trial of insider trading prosecutions, making the experience there particularly instructive.

2 While Mr. Rajaratnam received a four-level leadership role enhancement and two levels for obstruction of justice, his Guidelines range would still have been 121-151 months even without these increases.

has become "increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[3] That observation applies with particular force to the proposed amendment to § 2B1.4(b)(2) ("sophisticated" insider trading) which would, of necessity, spawn the type of application note that accompanies that amendment. Proposed Application Note 1 ("Application of Subsection (b)(2)") has no fewer than six examples of what might be indicia of "sophisticated insider trading." But some of those very factors, and indeed the inherent sophistication of insider trading, were considered at the time the higher base offense level of 8 for insider trading was set in November, 2001. As stated in the Background to § 2B1.4: "Insider trading is treated essentially as a sophisticated fraud." To now add sophistication as a separate adjustment, accompanied by a dizzying array of "factors," is to feed the problem of "factor creep."[4] The proposed amendment should be rejected.

The PAG also opposes the proposed addition of § 2B1.4(b)(3), which would impose a 4-level increase for harm based, in essence, on the defendant's status as a fiduciary. The harm implicit in that status is already adequately covered by the 2-level increase in § 3B1.3 for abuse of a position of private or public trust. We are aware of no documented need to double the abuse of trust penalty in the case of defendants convicted of insider trading. Moreover, no sufficient reason has been shown for the Commission to jettison, in the specific instance of insider trading cases, the carefully fashioned and longstanding jurisprudence which has interpreted § 3B1.3 and replace it with a surrogate, namely the listing in Application Note 2 of the myriad positions through which a defendant can be punished twice as much for the same failure of duty dealt with under § 3B1.3. Finally, while we recognize that § 2B1.1(b)(18), which covers security fraud offenses, provides a 4-level increase for certain fiduciaries, insider trading carries a greater base offense level. At a time when § 2B1.1 is resulting in overly severe ranges for several categories of securities fraud offenses, the Commission should not aggravate that situation by expanding it to insider trading cases.

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[3] Statement of Eric A. Tirschwell, Vice-Chair, Practitioners Advisory Group, February 16, 2011, at 10, citing to U.S. Sentencing Commission: Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, 137 (2004).

[4] A prosecutor could argue, for example, that someone who engaged in just one transaction did so in order to evade the "(F) . . . internal monitoring or auditing systems [designed] to subvert[]. . . the detection of the offense." It should come as no surprise that insider traders, like many other criminals, prefer not to have their conduct detected, yet the amendment would allow prosecutors to call such efforts "sophisticated."

The Commission has also requested public comment on the proposition that § 2B1.4, because of its focus on the profits earned as a result of insider trading, may not adequately account for "serious offense conduct" in which the defendant does not "necessarily realize high gains." But the scenario hypothesized – egregious insider trading that, because of "other market factors," does not yield significant profit – is not one that our members recall encountering. Indeed, if the profitability of insider trading was regularly thwarted by other market factors, it is unlikely the offense would be committed as often as the government now claims is the case. Given the isolated nature and improbability of unprofitable-yet-serious insider trading prosecutions, it would be impractical and unwise to respond with yet another system of sentence enhancements. Indeed, such enhancements would rarely address the perceived problem, yet risk unduly severe offense levels and unfair double counting in the run-of-the-mill insider trading case in which profits are reaped.

In short, we urge the Commission to follow its past practice, and heed its mandate to amend the Guidelines only after careful study of the underlying facts. *See Rita v. United States*, 551 U.S. 338, 349 (2007). Such study is particularly necessary in the insider trading context, given the serious debate over whether insider trading causes true harms to our markets. *See, e.g.*, Laura Hughes, *The Impact of Insider Trading Regulations on Stock Market Efficiency; A Critique of the Law and Economics Debate and a Cross-Country Comparison*, 23 Temp. Int'l & Comp. L.J. 479, 481 (2009). The PAG is unaware of any empirical data or other analysis demonstrating that the additional enhancements now proposed are needed to satisfy the statutory goals of sentencing. Until such time as those data are presented, the Commission should defer acting on the proposed amendments.

Calculation of Loss in § 2B1.1

The Commission has invited comment on the possibility of amending § 2B1.1 to address the complexity of calculating loss in securities fraud and similar cases and the potential sentencing disparities that may result from different courts applying different methods to calculate loss in these cases. The PAG agrees that the use of different methods in different circuits increases the likelihood of unfair and unwarranted disparity, and that the complexity of loss computation warrants guidance from the Commission.

Of the four methods the Commission is considering (methods (A) through (D)), the PAG recommends that the Commission adopt option (D), the market-adjusted method. Under the market-adjusted method, loss is based on the change in value of the security that can fairly be attributed to the fraud. It does so by accounting for those changes in value that were caused by external market forces. The most significant advantage of this method is that – unlike the other three

methods – it eliminates changes to the value of a security unrelated to the criminal conduct and the offender's culpability. As a result, it is the only method that reduces the risk of unwarranted disparity caused by external market factors unconnected to the crime, and is more likely than the other methods to account adequately for the culpability of the offender without an increase in the punishment resulting from consequences that were neither intended nor foreseeable.

None of the other three methods accounts for changes in the price of the security that are completely unconnected to the culpability of the offender. As a result, each of these other methods allows for dramatic increases in the punishment the offender will suffer as a result of market forces that have nothing to do with the offender's conduct. Any of these other three methods would allow for unwarranted disparity, because methodologies that fail to account for changes caused by external market forces will result in different sentences for offenders who engaged in identical conduct with equal culpability. An offender whose fraud happens to span a period that includes the negative influence of unrelated external market forces that dramatically reduce the value of the security will receive a much longer sentence than an offender who engages in the same conduct during a span that does not include the influence of those market forces. Use of the simple rescissory method (method (A)), the modified rescissory method (method (B)), or the market capitalization method (method (C)) would permit this disparity. And each of these other methods allows for increases in punishment based on consequences the offender did not intend, foresee, or cause.

The PAG recommends use of the market-adjusted method (method (D)) regardless of the type of fraudulent scheme. For investment fraud schemes in which the victims are fraudulently induced to invest in companies or products related to securities, including Ponzi schemes, external market forces rarely play a role, so that use of the market-adjusted method will not require exclusions for changes in value caused by those forces. For market manipulation or price manipulation fraud, the market-adjusted method is the only method of the four that will safeguard against unwarranted disparity. In the PAG's view, use of different methods for different types of securities fraud will only complicate the application of an already-complex sentencing consideration. That said, the Commission could clarify that one of these other methods is satisfactory if the government establishes the absence of outside influences on the stock price or if the parties agree that use of the substitute method suffices.

The PAG also recommends that the Commission provide further guidance by implementing the causation standard similar to that endorsed for civil cases in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). This standard is a suitable accompaniment to the market-adjusted method as both place emphasis on distinguishing the defendant's culpable actions from the effects of external market

forces. Just as civil securities fraud plaintiffs must prove that their economic loss was proximately caused by the defendant's misrepresentation as opposed to other independent market factors, so too should the government have to prove that loss was proximately caused by the defendant's fraudulent conduct as opposed to independent market factors.

Parties already rely upon expert opinion in these cases to prove what loss is attributable to the fraud. *See, e.g.*, *United States v. Rutkoske*, 506 F.3d 170, 180 (2d Cir. 2007) (government expert); *United States v. Olis*, 429 F.3d 540, 548 (5th Cir. 2005) (defense expert). The government is better equipped to provide expert analysis about the influence of external market forces and about the economic loss proximately caused by the fraud, and is already doing so in circuits in which this method has been favored. Placing the burden on the government is consistent with its current responsibility in the sentencing phase to prove the application of sentencing enhancements by a preponderance of the evidence. There is "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence." *Rutkoske*, 506 F.3d at 179.

Finally, the PAG sees no reason for a change to Application Note 3(F)(iv) to § 2B1.1. The Application Note as drafted is consistent with the market-adjusted method, and adoption of the market-adjusted method would not conflict with the Application Note. As a result, the Application Note need not be modified.

Financial Institution and Officer And Director Enhancements in § 2B1.1

The Commission has requested comment on whether changes should be made to § 2B1.1(b)(15) and (b)(18), which address fraud involving financial institutions and fraud involving officers and/or directors, respectively. The PAG believes that no expansion of the scope of these enhancement or the levels of the increases is either warranted or necessary, because these provisions, in combination with other specific offense characteristics, already more than account for the potential and actual harm to the public and financial markets.

Mortgage Fraud

The Commission seeks comment on two proposed changes related to mortgage fraud. The PAG does not believe that either change is needed, and we propose ways to avoid unintended confusion should the Commission go forward with its proposals.

Under the current Guidelines, the loss determined in mortgage fraud cases is the amount of the fraudulently obtained loan minus either the amount the victim

recovered or the fair market value of the asset pledged for the loan. If the loan payments remain current there is no enhancement for loss amount.

The proposed amendment would add two new ingredients to the calculation of loss in a mortgage fraud case; one is unnecessary, the other too unwieldy. We suggest that the Commission consider a different approach, one that we think will achieve the objective of ensuring that the loss amount appropriately reflects the seriousness of the offense, but without adding significant complexity to the sentencing hearing.

The Commission first proposes to amend Application Note 3 to reflect that in the case of a fraud involving a mortgage loan in which the collateral has been disposed of at a foreclosure sale the court should use the "amount recovered" at a foreclosure sale. This statement would appear to be a particular application of the more general "credit" rule stated one sentence earlier, which provides for a reduction in the loss amount by the amount recovered upon disposition of the collateral, or otherwise by the fair market value of the collateral at the time of sentencing.

We are not certain what the new language would add to the existing commentary, unless the intent is to make clear that in the event the original lender retains title to the collateral because it was the successful bidder at a foreclosure sale, the court should still treat that situation as involving the disposition of property. If indeed that is the case, then we suggest making clear that the "amount of the foreclosure sale" is used for the credit amount. The other wording – "amount recovered" – can be confusing in the event a lender obtains the property by bidding the amount of the loan, and thus arguably "recovers nothing" because it pays itself the amount of the bid. More importantly, we would make clear that this additional sentence is just one example of how the general credit rule mentioned above might be applied. Not only would this prevent courts from trying to figure out how the sentence is not superfluous, it would avoid the unwarranted negative inference that the rest of the credit rule (*i.e.*, use fair market value of collateral at time of sentencing if the collateral has not been disposed of) is inapplicable to mortgage cases. We also would make clear that this example is not the sole method for determining the amount of credit in a mortgage fraud case, because foreclosure sales are not the only way lenders recover the value of collateral, and such sales are not always the best measure of the value of the recovery.

The second proposed amendment to the Application Note is to suggest that the reasonably foreseeable administrative costs of a foreclosure action should be considered part of the reasonably foreseeable pecuniary harm, provided that the lending institution exercised due diligence. We appreciate the intent behind the proposal, but have serious concerns about the amount of complexity it will add to a loss calculation process that some participants already find to be heavily burdened. It would be hard to imagine two areas of mortgage lending more mired in controversy

right now than the operations of the foreclosure process and lender due diligence. Books have been written, and class actions have been filed, regarding both. We therefore see no reason to make mortgage fraud an exception to the general rule against calculating administrative costs, especially when it means importing those broad controversies into the realm of criminal sentencing of each specific individual. We also question whether the appropriately assessed administrative costs would vary enough from one case to the next to justify requiring a separate case-specific calculation in nearly every mortgage fraud prosecution. To our knowledge, there simply has not been a demonstrated need, such as documentation of cases where (1) sentence ranges for mortgage fraud were deemed inadequate; and (2) the inclusion of administrative costs would have cured the inadequacy.

Finally, with regard to whether the Commission should expand the Guidelines to provide for the consideration of harms avoided as a result of federal government intervention, we do not believe these changes are necessary. The Guidelines provide ample opportunity to account for these avoided harms through consideration of the actual or intended loss. To further expand the Guidelines for consideration of harms that might have occurred under different circumstances is a solution looking for a problem.

Harm To Public and Financial Markets

The Commission requests comment on whether the Guidelines Manual provides penalties that appropriately account for the potential and actual harm to the public and the financial markets from securities fraud, mortgage fraud, financial institution fraud, and similar offenses. In particular, the Commission asks whether it should more directly account for the potential and actual harms to the public and financial markets by providing a new enhancement within § 2B1.1 if the offense involved a significant disruption of a financial market or created a substantial risk of such a disruption. In the alternative, the Commission seeks comment on whether it should provide a new upward departure provision in § 2B1.1 that would apply if the offense involved such a disruption or created a substantial risk of such a disruption.

The PAG believes that offenses that significantly disrupt a financial market or create a substantial risk of such disruption are so rare that it would be inappropriate to complicate § 2B1.1 by adding a new enhancement or upward departure for that possibility. Indeed, despite the recent financial crisis, the PAG is unaware of any recent criminal prosecutions involving offenses that would qualify. Nor is the PAG aware of any case where the concern was expressed that the Guidelines constrained a sentencing judge from imposing a sentence that appropriately takes account of harms to the public or a financial market. In the event that there is an unusual offense that has such a disruptive effect or potential

effect, the general upward departure provisions of § 5K2.0, which are intended for extraordinary circumstances that have not adequately been taken into account in the determination of the applicable guidelines, are more than sufficient to ensure that such an offense is adequately punished consistent with 18 U.S.C. § 3553(a).

Although the PAG does not believe that attempting to define a specific departure provision is necessary or appropriate – in part because there is insufficient judicial experience with offenses that significantly disrupt financial markets – if the Commission were to do so we would recommend a general provision modeled after § 5K2.7 (Disruption of Governmental Function). One possibility would be the following statement: "If the defendant's conduct resulted in a significant disruption of a financial market or created a substantial risk of such a disruption, the court may decide to increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the financial market affected."

The Impact of Loss and Victims Tables in Certain Cases

The Commission has requested comment on potential ways to address the relatively high rate of below-range sentences – including those sponsored by the government – in cases sentenced under § 2B1.1 that involve relatively large loss amounts. The Commission notes criticism in judicial opinions and elsewhere that the culpability of some offenders can also be overstated by the operation of the victims table, sometimes due to the combination of enhancements from that table and the loss table. The PAG is extremely grateful for the opportunity to comment on these related and long-standing problems with the operation of § 2B1.1. As explained below, we believe that the Commission should address these problems through encouraged departures.

Gain-based modifications

The issue for comment first suggests a possible limitation on the impact of the loss table if the defendant had a gain that was small in proportion to the loss. Although the PAG agrees that the absence of significant gain is a distinction that should make a difference in sentencing outcomes, our concern is that the proposed solution would leave unaddressed some of the unwarranted similarity of treatment that the Guidelines currently advise for dissimilar defendants. We therefore propose below certain ways to improve on the proposal that the Commission has issued for comment.

A significant part of the problem, as we see it, is that defendants with materially different degrees of culpability can end up at the same offense level as a result of the great weight currently placed on loss amount. By way of example, a

defendant who inflicts $20 million in loss by selling worthless shares of stock in a bogus shell corporation, with the profits inuring directly to the defendant, is treated the same as someone who allows a real corporation to use incorrect accounting that has the effect of temporarily inflating the value of outstanding shares by $20 million. The second defendant would receive the same loss enhancement even if he realized no personal gain; even if his sole motivation was to keep his job; and even if he genuinely believed that the accounting treatment would be a short-term problem, corrected the following quarter, with no actual harm to long-term investors.

This second defendant is still guilty of fraud, but his culpability differs significantly from that of the first defendant – the "pump and dump" artist who acts solely for personal gain.

The first proposal would offer at least a partial solution to this problem. The loss table would be capped at an enhancement of 14 [or 16] levels for any fraud defendant who realizes no gain at all (or whose gain does not exceed $10,000). That change would treat a "no gain" defendant the same as a defendant who inflicted a loss of greater than $400,000 (under the 14-level enhancement option) or greater than $1,000,000 (under the 16-level option). Similar caps would apply for higher levels of gain.

Let there be no mistake: Although we think a "no gain" defendant should receive a lower loss-table cap than what the Commission proposes, the proposal would be a significant improvement over the current system.[5] There are difficulties with this proposed approach, however, that would likely need to be addressed over time. The Commission has not yet needed to grapple with a comprehensive definition of gain. Making a loss-table cap dependent on particular cutoffs in amount of gain could present application issues. In the example above of the employee who uses fraudulent accounting to keep his job, would his salary be treated as gain? If so, would it be one year's salary, or would it be the total wages earned between the time of the offense and its discovery? On a related note, is gain measured as a gross amount (similar to the § 2B1.1(b)(15)(A) enhancement for defendant who derives more than $1,000,000 in gross receipts from a financial

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[5] The cap works well for very large loss amounts, but even the less stringent of the two proposals (the 14-level cap) would treat a gain of zero the same as a gain (and corresponding loss) of nearly $1,000,000. And the 16-level cap would treat a gain of zero the same as a gain (and corresponding loss) of nearly $2,500,000. We would instead place the lowest loss-table cap at level 10, which would still produce a zone D range (15 – 21 months) for someone with a base level of 7, no other enhancements, no criminal history, and full acceptance of responsibility.

institution), or is it net profit? The latter, which provides a much better measurement of culpability, would require careful consideration of which "expenses" can be deducted from the gross amount.

If the same employee held stock but never sold it, would the court treat the increase in the value of that unsold stock as gain, even though the decision not to sell would itself be a sign of the employee's good faith belief that the scheme would not inflict an actual loss? Many of these issues would likely be fleshed out on a case-by-case basis.

Another problem is how to deal with "intended" loss situations. Suppose the scheme failed before there was any loss (or gain). The new provision would need to clarify that gain means "actual" gain, even if there is no actual loss. Otherwise, courts would need to engage in speculation about the amount of gain the defendant personally might have achieved (which, to further complicate matters, would not always be the same as "intended" gain).

Apart from the difficulties that would be encountered in determining whether the gain exceeds each relevant dollar amount threshold, the proposal would not address other ways in which the loss table overstates culpability. Take the example of a fraudulently obtained loan. Many different types of false statements could produce the same loss amount – as well as the same gain – even though the culpability of the defendant would vary greatly depending on the circumstances. A defendant might falsify information on a loan application with the good-faith intention of being able to pay off the loan and keep his legitimate business in operation. Another defendant might have no intention of making more than the first few payments, until he can obtain a new loan from someone else, perpetuating his fraud is the same manner as one operating a check-kiting or pyramid scheme. It is unlikely that the gain would differ in these two cases, especially if each loan goes into default soon after being disbursed. The defendant who tried to keep a legitimate business afloat does not deserve the same range as the defendant whose scheme never had a shred of legitimacy.

Our purpose in offering examples like these is not to discourage the Commission from amending § 2B1.1. Rather, we propose a different kind of change. As just noted, it would be difficult and cumbersome to implement a solution to these problems – and that effort would undoubtedly come up short – if the change is limited to gain-based caps for the loss table. It is not clear how to provide an adequate description of the various "lower culpability" frauds – much less a description that can be quantified through offense level reductions – all the while accounting for mitigating motives, differing levels of intent, and variations in the foreseeability or reasonable expectations of loss. In our view, this points to use of encouraged departures incorporating guidance based on factors such as those

mentioned above. The examples in the proposal involving relatively small gain could be used in this new encouraged departure provision. This approach would allow the Commission to offer non-exclusive instances in which lower culpability and higher culpability factors might affect the decision whether to depart.

We do not believe that this encouraged departure approach would necessarily be the Commission's last word on the subject. Rather, by guiding judges in their decisions to sentence below the range in high-loss cases the Commission would create a new structure for feedback on which combinations of factors warrant lower sentences. That process not only would allow the Commission to educate all participants in federal sentencing on how judges in numerous cases have assigned weight to various factors, it could pave the way for informed changes to the offense characteristics for all fraud cases.

As we noted above, if the choice is between capping the loss table as proposed, or doing nothing at all, we would welcome the Commission's proposal as a strong first step, and we would encourage the Commission to acknowledge in such an amendment that it is not a cure-all for the problem of overemphasis on loss. This would be consistent with our view that encouraged departures offer a better path to informed changes to the Guidelines ranges themselves.

Victims table

The Commission also seeks input on two possible ways to limit the effects of the victims table. We agree with the rationale behind the first of these, which would be to look to whether victims were "substantially harmed by the offense." The enhancements for 50 or more victims (4 levels) or 250 or more victims (6 levels) place sole weight on quantity (*i.e.*, the number of victims), without regard to the quality of the harm caused to them. A victim is defined in the application notes as anyone with *any* amount of actual loss. The example offered in the Issue for Comment is a step in the right direction because the larger enhancements would apply only if the offense substantially endangered the solvency or financial security of at least one victim. Taking a similar approach, the PAG recommends that those two enhancements incorporate a threshold of actual harm that avoids inclusion of victims with smaller losses. The two enhancements should be revised to apply if the offense caused each of the requisite number of victims (either 50 or 250) to suffer a loss of at least $1,000 (or some similar threshold amount). This would dispense with the need to prove that any victim suffered as severely as the Commission's example proposes (*i.e.*, that the offense substantially endangered the person's solvency or financial security).

The other victims table issue for comment is whether to limit the cumulative impact of the loss and victims tables. We agree that large loss amounts tend to go

hand-in-hand with larger numbers of victims. Thus, the same offense characteristic tends to get counted to a greater extent than the conduct warrants.

The solution is not simple, though. Creating a loss amount cutoff, as proposed, could lead to anomalies. For example, if no victim enhancements are imposed where the loss exceeds $7,000,000 (level 20), a defendant with a loss of $3,000,000 and more than 250 victims would receive 18 levels for the loss amount and 6 levels for victims (for a total increase of 24 levels). Yet a defendant with a loss amount of $15 million and more than 250 victims would receive just the loss enhancement of 20 levels, a significantly lower range for more culpable conduct.

Our proposal – which would limit the 4-level and 6-level victim enhancements to those victims with losses exceeding a threshold of $1,000 – would help address the problem of over-counting the significance of loss amount and number of victims. In particular, it would end the use of those victims enhancements where a large number of people have each suffered smaller losses. In addition, the Commission could avoid the anomalies mentioned above by building into the victim enhancement provision a series of limits tied to different loss enhancements. For example, the victim enhancement provision could be revised as follows:

> "If the enhancement under the loss table is level 14 or level 16, the victims enhancement shall not exceed 4 levels; if the enhancement under the loss table is level 18 or level 20, the victims enhancement shall not exceed 2 levels; if enhancement under the loss table is level 22 or higher, do not impose a victims enhancement."

Scope of changes

To the extent changes are made to mitigate the disproportionate impact of the loss amount table and the victims table, the Commission should apply them to all cases where the loss table is used. The problems that we have identified above, including significant differences in personal gain, motive, and the defendant's good-faith beliefs, are not peculiar to certain categories of fraud. To the extent a judge determines that they do not apply in any particular case, that judge can take that unusual circumstance into account in imposing sentence.

§ 2L1.2 – "Sentence Imposed" Under Illegal Re-Entry Guideline

The Commission proposes to resolve a circuit split regarding the interpretation of the "sentence imposed" language in § 2L1.2(b)(1). Specifically, the issue is whether the "sentence imposed" refers to the sentence that was actually imposed by the court at the time of sentencing (*i.e.*, before the defendant's

deportation), or whether the court should add to that sentence any additional time that resulted from a later revocation of probation or parole.

The PAG supports the proposal to amend the commentary to § 2L1.2 to reflect that "[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States." Four of the five courts of appeals that have spoken directly on this issue have construed the "sentence imposed" language to mean just that, and have rejected an interpretation that would allow the "sentence imposed" to relate back to a subsequently imposed sentence.[6]

The PAG agrees with the reasoning of the Fifth, Seventh, Tenth and Eleventh Circuits that "sentence imposed" should be interpreted to refer to the sentence that had been imposed as of the time of deportation. That interpretation is more consistent with the purpose of the enhancement scheme of § 2L1.2, which is to treat the illegal reentry defendant who illegally returns to the United States after committing a serious offense more harshly. As explained by the Fifth Circuit:

> The purpose of the sixteen-level enhancement is to ensure that a defendant who reenters the United States illegally after having committed a serious crime is punished more severely than a defendant who reenters the country illegally without having committed a serious crime. . . . A defendant who received a probated sentence is not as great a cause for concern as illegal reentry by a defendant who was given an actual sentence of imprisonment for the same offense, because the probated defendant's offense was not deemed to be as serious by the court of conviction.[7]

The fact that a probation sentence may have been subsequently revoked similarly fails to indicate that a more serious offense was afoot. Myriad

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[6] *See United States v. Rosales-Garcia*, __ F.3d __, 2012 WL 375518 (10th Cir. Feb. 7, 2012); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011); *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000); *see also United States v. Jimenez*, 258 F.3d 1120, 1125-26 (9th Cir. 2001) (prior offense counts as an "aggravated felony" under § 2L1.2 "[s]o long as [the statutory elements] were met *prior to* [defendant's] deportation and reentry") (emphasis added). In contrast, only the Second Circuit reads "sentence imposed" to include the cumulative sentence imposed, regardless of its temporal relation to the date of deportation. *See United States v. Compres-Paulino*, 393 F.3d 116 (2d Cir. 2004).

[7] *Bustillos-Pena*, 612 F.3d at 867.

circumstances can lead to a revocation, many of which have little to do with the original, pre-deportation sentence imposed.[8] In our experience, probation and parole revocations for illegal reentry clients are typically based on the illegal reentry itself. We also frequently see revocations based on a failure to report, a condition obviously inconsistent with being deported. The lengthier sentences that these two common types of revocations generate have absolutely nothing to do with the seriousness of the prior offense or the relative culpability of the defendant; in fact, an initial sentence of 13 months or less usually suggests that the prior offense was *less* serious or that the defendant was *less* culpable. Increasing sentences under § 2L1.2 for these defendants thus makes no sense.

Limiting the phrase "sentence imposed" to mean the sentence imposed at the time of deportation also avoids unwarranted disparities. Under the more expansive proposal, which would direct courts to ignore whether the revocation occurred before or after deportation, two illegal reentry defendants with less serious underlying offenses could easily wind up treated in very different ways for reasons wholly unrelated to offense seriousness or the purposes of punishment. Assume, for example, two defendants with identical criminal histories are to be sentenced under § 2L1.2. Both were previously arrested and convicted for the same offense, sentenced to probation, and deported. Both unlawfully return and are arrested by the state, which seeks to revoke both defendants' probation for being present in the country illegally. The first defendant's revocation proceeding goes forward and he is sentenced to 14 months for the probation violation. The revocation proceeding for the second defendant does not go forward as quickly. Both defendants are then found and apprehended by federal agents, and the second defendant is sentenced for illegal reentry before the state revocation proceeding concludes. If the Commission adopts the more expansive reading of "sentence imposed," the guidelines would instruct the court to impose a much higher sentence on the first defendant than on the second, based – quite literally – on the luck of the draw.

There is no empirical or logical justification for the Commission to amend § 2L1.2 to permit such an anomalous result. For these reasons, the PAG opposes the Commission's second proposal and supports its first, which would amend § 2L1.2's commentary to clarify that the "sentence imposed" means the sentence imposed before the date of deportation.

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[8] *Accord Lopez*, 634 F.3d at 951 ("Probation revocation sentences imposed after a defendant has been deported tell us little about the seriousness of either the prior drug trafficking crime or the new crime of illegal entry. Probation can be revoked for non-criminal and relatively less significant actions or inactions.").

Categorical Approach to Prior Convictions

The Commission's proposed amendment presents options for specifying the types of documents a court may consider when determining whether a particular prior conviction fits within a specified category of crimes. For example, this change would affect how to determine whether a prior conviction qualifies as an "aggravated felony." Option 1 would apply to determinations under the illegal re-entry guideline, § 2L1.2 (Unlawfully Entering or Remaining in the United States). Option 2 would apply throughout the Guidelines Manual in any case in which the nature of the prior conviction must be determined. The PAG favors the option (designated as option A) that most closely approximates what courts are required to do in related contexts beyond the Guidelines. The PAG also suggests applying this approach uniformly in the Manual to promote consistency and minimize complexity. Thus, option 2A is the preferred amendment.

As the Commission's synopsis explains, option A most closely tracks the approach the Supreme Court has set forth for statute-based prior criminal history enhancements. The decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), limit the types of documents a court may consider in determining the class of a particular offense. Expanding beyond this list would create two standards – one for the Guidelines and another for statutory enhancements – for no good reason. It would also risk the need to litigate (or, in some cases, relitigate) what was at issue in prior cases – many involving guilty pleas – where the record may be stale, incomplete, or unreliable.

District courts should simply apply the law and analysis developed by the Supreme Court, rather than embark on creating a common law of classifying different categories of materials based on standards that deviate from the dictates of *Taylor, Shepard*, and other cases that have followed. Option 2A, which would take a consistent categorical approach throughout the Guidelines Manual, is the best proposal.

Burglary of a Non-Dwelling

The issue whether to include "Burglary of Non-Dwelling" in the definition of "crime of violence" is intertwined with the categorical approach proposal previously discussed.

The Commission correctly determined long ago that burglaries of non-dwellings are sufficiently distinct from burglaries of dwellings and from other specified offenses (such as murder and arson) that they are not inherently crimes of

violence. The Commission has therefore excluded them from the list of offenses specified by name alone as crimes of violence.

In resolving the split in the Circuits, the Commission should avoid an approach that undermines the rules for making categorical determinations. Rather, as spelled out in the second option, the Commission should include burglaries of structures other than dwellings only if the offense has one of the elements specified in subsection (a)(1) of the definition of a crime of violence (*i.e.*, an element of "use, attempted use, or threatened use of physical force against the person of another"). Other approaches needlessly complicate the determination of a crime of violence and might discourage Congress from eventually revising the relevant statutes to conform with the Commission's reasoned approach.

Driving While Intoxicated

The Commission proposes an amendment that would count all driving while intoxicated (or driving under the influence (DUI) convictions) in the calculation of the Criminal History Score irrespective of offense classification or level of punishment imposed. The PAG agrees with the desirability of resolving the existing circuit conflict, but we recommend adopting the approach used by the Second Circuit, which more accurately accounts for the seriousness of prior offenses.

When a prior sentence is a misdemeanor or petty offense, § 4A1.2(c) specifies two exceptions to counting the offense. Each exception is tied to the nature of the offense. On one list are offenses ranging from "careless or reckless driving" to "trespassing," and the exception applies if the prior offense is on (or similar to an offense that is on) the list. In such a case, the sentence is counted only if: (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense. *See* § 4A1.2(c)(1). On the second list are offenses from "fish and game violations" to "vagrancy," and the exception applies to any offense that is on the list (or similar to an offense that is on) the list. In such a case, the sentence is never counted. *See* § 4A1.2(c)(2).

Some circuits have held that a sentence for driving while intoxicated, whether a felony, misdemeanor, or petty offense, is always counted toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits rely on Application Note 5 to § 4A1.2, which provides:

> Sentences for Driving While Intoxicated or Under the Influence. – Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such

offenses are not minor traffic infractions within the meaning of § 4A1.2(c).

The proposed amendment suggests that Application Note 5 be amended consistent with the approaches of the Seventh and Eighth Circuits, which hold that such convictions are always counted, without regard to how the offense is classified and without regard to whether § 4A1.2(c)(1) applies.

The Second Circuit has held that driving while ability is impaired can be similar to other misdemeanor or petty offenses included in the list of offenses under § 4A1.2(c)(1), and therefore should be counted only if (A) the sentence resulted in a sentence of a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense. The approach utilized by the Second Circuit allows for the sentence imposed for a prior conviction to reflect the severity of that prior offense. A sentence of less than one year probation or less than thirty days imprisonment suggests a less serious offense similar to careless or reckless driving and should be treated accordingly. If this results in an understatement of the risks associated with a defendant's prior record, § 4A1.3 provides the opportunity to depart based on the inadequacy of the criminal history score.

The PAG therefore proposes that the offense of driving while ability is impaired be added to the list of offenses in § 4A1.2(c)(1) and that Note 5 be modified accordingly.

Multiple counts

The Commission's proposed amendment to § 5G1.2, which governs multiple counts in cases where the outcome is controlled by a mandatory minimum statute, would create a uniform approach across circuits. The PAG believes, however, that if uniformity is really needed for the computation of concurrent sentences that have no effect on the total sentence, the better approach would be to instruct judges to impose such sentences in a manner more faithful to § 3553(a) and the Guidelines themselves.

As an initial matter, it is our understanding that the circuit split at issue here is not resulting in different prison term outcomes for similarly situated defendants. The amendment addresses cases where a mandatory minimum ends up trumping the Guideline range, either in whole (where the mandatory minimum exceeds the top of the range) or in part (where the mandatory minimum lands within the range). The question in such cases is whether the concurrent prison terms on the *non*-mandatory-minimum counts should be imposed as if they too were controlled by a mandatory minimum statute. Because these other counts get

concurrent time, the total sentence will be the same whichever approach the court uses.

Although the Commission's approach has no effect on actual sentence outcomes, it gives unnecessary weight to the mandatory minimum provisions in federal law. Granted, these provisions are sometimes so dominant in particular cases that all other considerations seem irrelevant. Nevertheless, even in these cases, a court does more than simply "go through the motions" when it gives separate consideration to charges that, practically speaking, are swallowed up by one count's mandatory minimum. We believe the proposed amendment to § 5G1.2 would deprive the Commission and others of a sentencing judge's assessment of the appropriate sentence but for the mandatory minimum statute.[9]

That is, in fact, the result achieved in the example of Defendant A in the new Application Note 3(C): Only one count in that defendant's case carries a mandatory minimum, but that charge (calling for a ten-year prison term) is allowed to set the recommended punishment for three other charges for which the advisory range (absent the mandatory minimum) would have been about three years at most. Without the proposed amendment, judges would be more likely to provide case-by-case feedback on whether a mandatory minimum statute is resulting in sentences greater than necessary to achieve all of the purposes of punishment. With the proposed amendment, judges will have little need to consider the Guidelines factors or any other aspect of § 3553(a).

It is precisely this sort of short-cut that the Ninth Circuit discussed in *United States v. Evans-Martinez*, 611 F.3d 635 (9th Cir. 2010), when it said regarding a case very similar to Defendant A's:

> [O]ne might think the logical place to start reckoning his sentence under the Sentencing Guidelines would be with that minimum sentence. It could become the advisory Guidelines sentence from which

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[9] There is one important way in which the Commission's proposal would unfairly aggravate sentencing outcomes for a number of defendants who are later convicted and sentenced for new federal or state offenses. Under § 4A1.2(a)(2), which governs computation of the Criminal History Score, prior sentences for multiple offenses are counted separately whenever they were imposed for offenses that had been separated by an intervening arrest, even if the prior offenses had been listed in the same charging document and sentenced on the same day. Thus, for later sentences imposed in the federal system or in any State with a sentencing regime that also assigns weight to prior convictions based on the length of sentence imposed, the Commission's proposal would overstate the seriousness of prior convictions for a number of prior offenses that did not carry a mandatory minimum.

> – after taking into consideration relevant aggravating and mitigating factors – all three counts could be sentenced.

Id. at 637. But there are presumably good reasons why the Guidelines would recommend a prison term of just 30 - 36 months for several of Defendant A's charges, and the sentencing court should be encouraged to recognize, not skip over, these relevant characteristics.

The proposed amendment also fails to rectify the "absurd result" that the Ninth Circuit warned about in *Evans-Martinez*: namely, the possibility that two different mandatory minimums would cause two different "guideline sentences" for *every* count. *Evans-Martinez*, 611 F.3d at 641-642. The proposed language for § 5G1.2(b) also runs the risk of confusion that the District of Columbia Circuit identified in *United States v. Kennedy*, 133 F.3d 53 (D.C. Cir. 1998): If the mandatory minimum is to be the Guidelines' advisory "total punishment," how could anything else be "otherwise required by law"? *Id.* at 61. It makes more sense to say that the *Guidelines'* range is the "total punishment" recommended for all counts, making exception only when a mandatory minimum for a particular count makes a longer prison term "otherwise required by law."

Under our approach, we would also promote simplicity by not dictating our preferred method over any others. We would simply direct courts to apply a term of imprisonment on the non-mandatory-minimum counts. We would add that this term may be the term the court would have imposed in the absence of a mandatory minimum on one or more other counts so long as the court imposes a total sentence consistent with the total punishment determined by the court under the Guidelines and § 3553(a). With that approach, the Commission could dispense with its proposal to add a new and complex application note to § 5G1.2 that has no effect at all on the amount of time a defendant ends up serving.

Rehabilitation

The Commission has requested comment on two options intended to address the impact of *Pepper v. United States*, 131 S. Ct. 1229 (2011), on § 5K2.19 (Post-Sentencing Rehabilitative Efforts). For reasons of continuity and simplicity, the PAG recommends that the Commission adopt Option 1 – the repeal of § 5K2.19.

Section 5K2.19 was promulgated in 2000 to resolve a Circuit-split concerning the propriety of "post-sentencing rehabilitation" departures. *See Quesada Mosquera v. United States*, 243 F.3d 685 (2d Cir. 2001). Notable for present purposes, in promulgating this amendment the Commission left undisturbed departures based on a defendant's post-offense, pre-sentencing rehabilitative efforts, which were then

recognized and available in appropriate circumstances, even though the Manual did not address them.

Following *Koon v. United States*, 518 U.S. 81 (1996), courts held that post-offense rehabilitation efforts (including efforts occurring post-sentencing) could provide a basis for relief from the prescribed guideline range. *See United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000); *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999); *United States v. Roberts*, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpublished); *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998) *rev'g United States v. Ziegler*, 39 F.3d 1058 (10th Cir. 1994); *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998), *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997); *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997), *rev'g United States v. Van Dyke*, 895 F.2d 984 (4th Cir. 1990); *see also United States v. Maier*, 975 F.2d 944, 947-49 (2d Cir. 1992). The accepted standard was that courts could depart where a defendant's efforts presented to a degree atypical of the circumstances that give rise to an acceptance of responsibility adjustment. *Brock*, 108 F.3d at 35. With respect to the latter, practically speaking, "[a]cceptance of responsibility is easily achieved and is accordingly of relatively low value. Defendants who accomplish a successful rehabilitation go far beyond what is required to qualify for the deduction under §3E1.1." *United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997) *cert. denied*, *Reyes v. United States*, 522 U.S. 1067 (1998). The Third Circuit articulated perhaps the most complete definition of instances where relief should reflect a defendant's "concrete gains toward 'turning his life around."

> Unlike the usual adjustment for acceptance of responsibility where the defendant may all-too-often be tempted to feign remorse for their crimes and be rewarded for it, we view the opportunity for downward departures based on extraordinary or exceptional post-conviction rehabilitation efforts as a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and rebuild their lives.

United States v. Sally, 116 F.3d 76, 81 (3rd Cir. 1997); *see also United States v. Williams*, 65 F.3d 301, 305 (2d Cir. 1995) ("a tentative step towards rehabilitation usually is not enough to warrant a downward departure"). In fact, seven of the eight circuits to address the issue before the promulgation of § 5K2.19 approved of departures to account for post-sentencing rehabilitation. *Sally*, 116 F.3d at 81; *United States v. Core*, 125 F.3d 74 (2d Cir. 1997); *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998); *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999); *United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000); *United States v. Roberts*, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpublished).

The above holdings obviously pre-date *Booker*. Importantly in this regard, the *Pepper* court made no reference to this established body of law, framing the issue instead as whether § 5K2.19 violates controlling statutes, signaling clearly the relative import of traditional "departure" analysis. *Pepper* rejected the binding effect as well as the reasoning of § 5K2.19 on policy grounds without suggesting, let alone directing, that the Manual be amended to define the circumstances under which post-offense (and post-sentencing) rehabilitation departures may be warranted. *Pepper v. United States*, 131 S. Ct. at 1247. Option 1 gives full effect to *Pepper* in the clearest, least confusing, and most effective way, without disturbing courts' historic discretionary role in assessing relief on that basis. Said differently, Option 1 advances the ends of consistency and simplicity.

The PAG sees Option 2 as problematic because it unnecessarily invites further challenges to the Commission's policy rationales. As a practical matter, it is impossible to list the full array of efforts that might constitute post-offense rehabilitation. *See Koon v. United States*, 518 U.S. 81, 113 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). The Commission implicitly recognized this reality when it did not define post-offense rehabilitation in § 5K2.19. Moreover, through Option 2, the Commission risks invading courts' statutory authority and responsibilities. *See*, *e.g.*, *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (courts must "consider all of the § 3553(a) factors" before making "an individualized assessment based on the facts presented"); 18 U.S.C. §§ 3553(a)(1) ("history and characteristics of the defendant"), 3553(a)(2) ("the need for the sentence imposed") and 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person … for the purpose of imposing an appropriate sentence.").

If the Commission decides to move forward on Option 2, the PAG urges elimination of the "unusual degree" test. It is inconsistent with established case law and with the Manual's standards in comparable situations where the Commission is *not* discouraging departures. In fact, the "unusual degree" requirement would make post-sentencing rehabilitation nearly indistinguishable from those factors that the Commission has deemed *not* ordinarily relevant. The PAG also sees no need to add the reference that pre-sentencing rehabilitative efforts may be relevant in determining acceptance of responsibility. The relevant factors for that downward adjustment (including rehabilitation efforts) are already covered in a comprehensive manner in § 3E1.1. The PAG recommends simply instructing that rehabilitative efforts may be relevant in determining whether a departure is warranted. This is consistent with *Pepper* and 18 U.S.C. §§ 3553(a) &

3661 and will incentivize defendants to undertake meaningful rehabilitation efforts following arrest, including during the period after conviction.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input for the 2012 amendment cycle. We look forward to an opportunity for further discussion as the proposed changes are finalized.

Sincerely,

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